SUPREME COURT, U.S.
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No. 01-246

IN THE

Supreme Court of the United States

MARK MORTENSON,

Petitioner,

v.

ROCK SPRINGS VISTA DEVELOPMENT CORP., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. May an injury related to discriminatory *structural* conditions (as described in subparagraph 804(f)(3)(C) of the Fair Housing Act (codified at 42 U.S.C. § 3604(f)(2)(C)) constitute an "injury in fact" for the purpose of establishing standing under 42 U.S.C. § 3604(f)(2)?

2. Do *intangible* injuries to a plaintiff who seeks monetary relief for discrimination in violation of paragraph 804(f)(2) of the Fair Housing Act (codified at 42 U.S.C. § 3604(f)(2)), constitute "distinct and palpable" injuries for the purposes of establishing standing under Article III of the U.S. Constitution?

3. Whether the Ninth Circuit Court of Appeals properly decided the issue of standing.

4. Whether this case presents a basis for this Court to exercise its certiorari power.

STATEMENT PURSUANT TO RULE 29.6

Respondents have no parent corporations and no publicly held company owns 10% or more of the stock of any of the Respondents.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Statement of the Case	1
A. Background to Mortenson's Claim	1
B. The Decision of the Courts Below	2
Reasons for Denying the Writ	3
A. The Ninth Circuit Correctly Ruled that Mortenson Lacked Standing to Bring a Claim under 42 U.S.C. § 3604(f)(2) in Accordance with This Court's Prior Decisions.	3
1. The Court must interpret § 3604(f)(2) in harmony with § 3604(f)(1).	3
2. The legislative history of § 3604(f)(2) demonstrates that Congress did not intend this section to be interpreted as broadly as Petitioner urges.	4

Contents

Page

3. The Ninth Circuit's decision in this case is not in conflict with the Department of Housing and Urban Development's policy. 6

4. A claim under § 3604(f)(2) must still meet Constitutional standing requirements. 7

B. The Ninth Circuit's Decision is Not in Conflict with Decisions of other Circuit Courts of Appeal. 9

Conclusion 11

TABLE OF CITED AUTHORITIES

Page

Cases:

Banai v. Secretary, U.S. Dept. of Housing, 102 F.3d 1203 (11th Cir. 1997) 9

Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979) 7, 8

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 5, 8

In re Jackson, 184 F.3d 1046 (9th Cir. 1999) 3, 4

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 3, 7

Morgan v. Secretary of Housing and Urban Dev., 985 F.2d 1451 (10th Cir. 1993) 9

Ragin v. Harry Macklowe Real Estate Co., 6 F.3d 898 (2d Cir. 1993) 9

Tyus v. Urban Search Management, 102 F.3d 256 (7th Cir. 1996) 9

United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544 (1996) 3

United States v. Balistrieri, 981 F.2d 916 (7th Cir. 1992) 9, 10

Cited Authorities

	Page
United States v. Fiorillo, 186 F.3d 1136 (9th Cir. 1999)	3
United States v. Menasche, 348 U.S. 528 (1955)	3
United States Constitution:	
Article III	i, 7
Statutes:	
42 U.S.C. § 3604(c)	9, 10
42 U.S.C.A. § 3604(f)(1)	3, 4, 5, 10
42 U.S.C. § 3604(f)(2)	*passim*
42 U.S.C.A. § 3604(f)(2)(C)	i
42 U.S.C.A. § 3614	1
Other Authority:	
H.R. Rep. 100-711, 100th Congress, 2d Sess., 1988 WL 169781 (1988)	4

STATEMENT OF THE CASE

Respondents offer the following as a correct account of the facts in this case.

A. Background to Mortenson's Claim

This case originated when the United States filed a complaint against Rock Springs Vista Development Corporation, J.A. Black Construction, Inc. and James A. Black (hereinafter collectively referred to as "J.A. Black") under 42 U.S.C.A. § 3614 alleging a pattern of discrimination relating to the design and construction of five condominium developments (the Rock Springs Vista Developments). Petitioner Mortenson is a wheelchair user who filed a Complaint in Intervention claiming damages for discrimination as a result of an alleged visit to a Rock Springs Vista Development. The *sole* allegation in Mortenson's First Amended Complaint in Intervention regarding his involvement with the development states: "... ROCK SPRINGS VISTA DEVELOPMENT CORPORATION is the builder of ... the condominium development visited by MORTENSON during his search for suitable housing during 1995." Mortenson has not alleged any connection to or interest in the condominium other than his single alleged visit. Although Mortenson has claimed to have been conducting a housing search at the time of his alleged visit, there is no evidence in the record below indicating that he ever purchased or otherwise acquired any housing in Las Vegas. The First Amended Complaint filed by Mortenson does not contain any allegation that he was ever legitimately interested in purchasing a condominium in Las Vegas, nor does it allege that Mortenson would have the means to purchase a condominium in Las Vegas.

B. The Decision of the Courts Below

On June 28, 1999, Respondents filed their Motion to Dismiss Plaintiff's [Petitioner's] First Amended Complaint in Intervention and, on June 30, 1999, a hearing was held on the Motion. On July 2, 1999, the district court entered its Order holding that the alleged discriminatory structural conditions encountered by Mortenson did not constitute "terms, conditions, or privileges that discriminate against Mortenson" and that, accordingly, Petitioner had "not alleged a particularized injury." Furthermore, the district court held that Mortenson had "not alleged claims that are redressable."

After a timely appeal to the United States Court of Appeals for the Ninth Circuit, briefing, and oral argument on February 14, 2001, the circuit court of appeals entered its Memorandum Opinion on May 8, 2001, affirming the decision of the district court. The Ninth Circuit held that: (1) Mortenson's allegations of "nominal" damages for intangible injuries were insufficient to constitute "actual" damages under the Fair Housing Act; and (2) Mortenson's injuries related to encountering inaccessible structural conditions at Rock Springs Vista did not constitute cognizable injuries under 42 U.S.C. § 3604(f)(2). Mortenson subsequently moved for rehearing, which motion was denied on July 5, 2001. (Petitioner's Appendix C).

REASONS FOR DENYING THE WRIT

A. The Ninth Circuit Correctly Ruled that Mortenson Lacked Standing to Bring a Claim under 42 U.S.C. § 3604(f)(2) in Accordance with This Court's Prior Decisions.

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), this Court codified the "irreducible constitutional minimum of standing" as: (1) injury in fact; (2) causation; and (3) redressability. An injury in fact is an "invasion of a legally protected interest which is: (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." *Id.* Thus, Petitioner Mortenson was required to allege a concrete injury, traceable to Respondents' actions that was redressable by a favorable decision. Petitioner claims injury under §§ 3604(f)(1) and 3604(f)(2). Petitioner contends that the Ninth Circuit erred as to its decision regarding Petitioner's standing under subsection 3604(f)(2). As the Ninth Circuit correctly held, Petitioner does not have standing under either section.

1. *The Court must interpret § 3604(f)(2) in harmony with § 3604(f)(1).* It is a basic principle of statutory construction that one section of a statute must not be interpreted in such a manner as to render another section meaningless. *See United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 550 (1996) ("the more natural reading of the statute's text, which would given effect to all of its provisions, always prevails over a mere suggestion to disregard or ignore duly enacted law as legislative oversight"); *United States v. Menasche*, 348 U.S. 528, 538 (1955) ("the more natural principal of statutory construction is to save and not destroy"); *United States v. Fiorillo*, 186 F.3d 1136, 1153 (9th Cir. 1999); *In re Jackson*, 184 F.3d 1046, 1052 (9th Cir.

1999). Section 3064(f)(1) by its plain language is limited to persons who are buyers or renters of property. Any interpretation of § 3604(f)(2) must preserve that limitation. Petitioner, however, encourages this Court to find that § 3604(f)(2) be interpreted to mean that any person has standing under that subsection regardless of their status and regardless of their claimed injury. Such an interpretation would essentially eliminate § 3604(f)(1).

2. *The legislative history of § 3604(f)(2) demonstrates that Congress did not intend this section to be interpreted as broadly as Petitioner urges.* Congress adopted the Fair Housing Amendments Act (FHAA) in 1988. In conjunction with the passage of the Act, the House of Representatives issued a Report which reviewed the new material incorporated into the Fair Housing Act. H.R. Rep. 100-711. That report specifically addressed the intended scope of § 3604(f)(2) as follows:

> New subsection [3604](f)(2) would similarly prohibit discrimination against the same persons in the terms, conditions, privileges, or provision of services or facilities. This provision is intended to prohibit special restrictive covenants or other terms or conditions, or denials of service because of an individual's handicap and which have the effect of excluding, for example, congregate living arrangement for persons with handicaps. It would guarantee, for example, that an individual could not be discriminatorily barred from access to recreation facilities, use of premises, benefits and privileges made available to other tenants, residents and owners.

H.R. Rep. 100-711, 100th Congress, 2d Sess., 1988 WL 169781 (1988).

With this explanation of legislative intent as a backdrop, it is clear how these two statutory provisions should be read together. Subsection (f)(1) prohibits discrimination which amounts to an outright refusal to sell or rent to persons with disabilities. Such discrimination by its very nature would tend to be open and obvious. Therefore, since such discrimination can be readily detected, there is no need to grant a private cause of action to enforce this statute to a broad class of plaintiffs.

Subsection (f)(2), however, covers discrimination where there is not an outright refusal to sell or rent to persons with disabilities. Such kinds of discrimination are generally only uncovered by an investigation involving sending different people in to gather information from a housing provider. Thus, this Court has held that "testers" who are not legitimately interested in acquiring housing may have standing in cases involving discriminatory housing pricing. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). However, in a case involving claims of improper design and construction, the discrimination would tend to be open and obvious. Accessibility barriers are generally objective, readily observable conditions, such as steps on sidewalks. Therefore, because this type of discrimination is not hidden, as in racial discrimination cases, there is no need for testers in order to determine whether such discrimination is occurring. Either the structure is handicap accessible or it is not. There is no reason to assume that Congress intended § 3604(f)(2) to confer tester standing in handicap discrimination cases involving open and obvious design and construction issues. Indeed because this kind of discrimination is open and obvious there is nothing to test. Sending a minority member posing as an applicant to a housing complex suspected of racial discrimination "tests" that hypothesis. In such a case,

the discrimination does not occur until the tester goes on site. When dealing with accessability barriers however the discrimination is present once construction is complete. No one can "test" whether a step exists in a sidewalk. The step is either there or it isn't. If the step is there, then people actually injured by the step can bring a claim. Absent such an actual injury however, there is no standing.

3. *The Ninth Circuit's decision in this case is not in conflict with the Department of Housing and Urban Development's policy.* Petitioner, in his Brief, cites to a Memorandum prepared within the Department of Housing and Urban Development and argues that the Ninth Circuit's decision in this case is contrary to this Memorandum. Further, Mortenson contends that the HUD Memorandum supports his claim that any person would have standing under § 3604(f)(2), regardless of the claimed injury. However, such contention grossly oversimplifies and overstates the meaning of the Memorandum in question.

Petitioner merely cites the Memorandum as standing for the proposition that "the national policy of the U.S. Department of Housing and Urban Development (HUD) is to treat design and construction discrimination as actionable under 42 U.S.C. § 3604(f)(2)" without any further discussion of the contents of the Memorandum. (Mortenson's Petition for Certiorari at 7). However, the HUD Memorandum explicitly states: "A complainant who is not actually interested in purchasing or able to purchase a unit still *may* be able to file a complaint against a respondent . . . *if* the complainant is a tester his/her complaint may alleged that paragraph 804(f)(2) was violated. . . ." (Petitioner's Appendix G) (emphasis added). First, this Court should note that the terms of the Memorandum are equivocal.

It does not indicate that persons who are not buyers or renters have standing under § 804(f)(2) (codified at 42 U.S.C. § 3604(f)(2)). Rather, the Memorandum indicates that standing under subsection (f)(2) is a possibility. Moreover, the Memorandum itself limits its application to "testers." As discussed above, "Tester Standing" is inapplicable to a case such as this involving allegations of discriminatory construction which are open and obvious. Thus, the decision of the Ninth Circuit in this case does not conflict with HUD's Memorandum. Rather, the Memorandum actually supports the Ninth Circuit's holding that the Petitioner does not having standing under § 3604(f)(2).

4. *A claim under § 3604(f)(2) must still meet Constitutional standing requirements.* Section 3604(f)(2) does apply to "any person." However, even under the broad standing conveyed when the term "any person" is used, a claim must still meet the minimum requirements of Article III. *See, e.g., Lujan, supra.* In *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), this Court acknowledged that while standing under the FHA was broad, a plaintiff must have "suffered 'a distinct and palpable injury to himself,' . . . that is likely to be redressed if the requested relief is granted," *id.* at 100 (citations omitted) and recognized that this requirement was a Constitutional limitation on standing. The *Gladstone* case involved racial discrimination in the form of "steering" in a particular neighborhood. The Court found that those plaintiffs who alleged injury to the neighborhood in which they lived had standing while plaintiffs who did not reside in the neighborhood at issue lacked standing to sue. Therefore, this Court must analyze this standing issue by referring to Mortenson's claimed injuries.

The only discrimination Petitioner claims stems from the design and construction of the Rock Springs Vista development. This type of discrimination primarily serves to impact residents or those with close ties to residents. As this Court noted in *Havens*, "[w]e have not suggested that discrimination within a single housing complex might give rise to 'distinct and palpable injury' . . . throughout a metropolitan area." *Havens*, *supra* at 377 (citation omitted). This Court determined that some type of interest in the subject neighborhood was required to meet the constitutional threshold for standing. However, Petitioner here makes only the general claim that the alleged discrimination within the Rock Springs Vista development somehow caused him injury. Petitioner has not alleged any particular interest in the development.

As the Ninth Circuit correctly determined, Mortenson has not alleged a distinct and palpable injury fairly traceable to Respondents. He claims that his injury stemmed from being denied "the full range of housing opportunities . . . , the opportunity to live in an integrated area . . . , and frustration, mental anguish, humiliation, and embarassment. . . ." (Petitioner's Appendix E, p. 27a). Petitioner does not allege that he was denied a specific housing opportunity that he wished to pursue, nor does he allege that any act of Respondents led to a secondary injury of the type referred to in *Gladstone*. Instead, he alleges only the type of generalized injury that was rejected by this Court in *Havens*. Thus, contrary to the assertions of the Petitioner here, the Ninth Circuit's decision is clearly in line with this Court's prior holdings.

B. The Ninth Circuit's Decision is Not in Conflict with Decisions of other Circuit Courts of Appeal.

Petitioner argues that this Court should grant his Petition for Certiorari because the Ninth Circuit's decision in this case is in conflict with the holdings of at least four other circuit courts.[1] However, these cases are easily factually and legally distinguishable from the case at bar. For example, Petitioner cites *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 907 (2d Cir. 1993), in which the Second Circuit found that African-American newspaper readers who saw advertisements depicting only white models in ads for residential apartments had standing to maintain an action under 42 U.S.C. § 3604(c), even if they were not in the market for housing when they viewed the ads. Petitioner cites this case as standing for the proposition that he did not have to allege an interest in the property to have standing to sue. However, *Ragin* involved an entirely different subsection of the Fair Housing Act, § 3604(c), which deals with racially discriminatory advertising.[2]

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1. Petitioner cites five such cases specifically: *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 907 (2d Cir. 1993), *Tyus v. Urban Search Management*, 102 F.3d 256, 265 (7th Cir. 1996) (suit against owner of upscale apartment complex and his wife for their alleged racially discriminatory advertisements), *United States v. Balistrieri*, 981 F.2d 916, 926 (7th Cir. 1992), *Morgan v. Secretary of Housing and Urban Dev.*, 985 F.2d 1451 (10th Cir. 1993) (familial status case in which the court found that "more than mere assertions of emotional distress are required"), and *Banai v. Secretary, U.S. Dept. of Housing*, 102 F.3d 1203, 1207 (11th Cir. 1997) (racial discrimination case).

2. Subsection 3604(c) prohibits discrimination in housing advertisements on the basis of race, color, religion, sex, handicap, familial, or national origin.

There is a fundamental difference between the discrimination proscribed by subsection 3604(c) and the type alleged by Petitioner here. Advertising, by its very nature, reaches beyond the bounds of a particular housing community. Therefore, it is possible for such advertising to impact someone with no connection to the community. However, in order for a community's design and construction to impact someone, they must have a direct connection to that community. The record makes it abundantly clear that Petitioner has demonstrated no such link. Therefore, Petitioner is attempting to make an analogy that doesn't work. Subsection 3604(c) does not limit or qualify a claim as does subsection 3604(f)(1), which requires a plaintiff to have some interest in the property as a buyer or renter.

Petitioner also cites the *Balistrieri* case out of the Seventh Circuit as being in conflict with the Ninth Circuit. Again, this case involved racial discrimination and "testers." Further, the court in *Balistrieri* held that a plaintiff must actually prove that he suffers from emotional distress and the alleged discrimination caused that distress and not resort to mere conclusory statements. The Ninth Circuit here found no evidence of injury in fact nor has Petitioner alleged any concrete injury apart from the alleged violation of 42 U.S.C. § 3604(f)(2). Moreover, as previously discussed, Petitioner is not a "tester". Therefore, none of the cases from other circuits cited by Petitioner even indirectly conflict with the decision of the Ninth Circuit in this matter.

CONCLUSION

The Ninth Circuit's decision in this case was correct. The HUD Memorandum, this Court's prior holdings, and the decisions from other circuits cited by Petitioner do not support Mortenson's claim of standing under 42 U.S.C. § 3604(f)(2). Petitioner has failed to allege a concrete and palpable injury traceable to Respondents' actions. Mortenson had no interest in the property nor has he ever claimed to be a tester in this case. Thus, Petitioner lacks the requisite constitutional standing and accordingly, his Petition for Certiorari should be denied.

Respectfully submitted,

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